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Supreme Court of the United States

October Term, 1934

No. 60

THE INDIANA FARMER'S GUIDE PUBLISHING COMPANY,

Petitioner

vs.

THE PRAIRIE FARMER PUBLISHING COMPANY, et al.,

Respondents

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

I

Opinions of Courts Below

The District Court did not file a written opinion. That of the Circuit Court of Appeals (R. 154) affirming the judgment of the District Court is reported in 70 Fed. (2d) 3.

II

Jurisdiction

This cause is before the Honorable Court on writ of certiorari, granted by an order entered herein on October 8, 1934, to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed, on March 30, 1934, a judgment rendered against the plaintiff, petitioner herein, by the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

The jurisdiction of this Court was invoked by a petition for a writ of certiorari, seasonably filed on May 23, 1934, pursuant to Section 240 (a), Act of February 13, 1925, Chapter 229, 43 Stat. 936; Section 347 Title 28, U. S. C. A.

III

Statement of the Matters Involved

The petitioner brought this action under sections 1, 2 and 7 of the Sherman Anti-Trust Act, to recover damages by it sustained because of the concerted activities of the respondents, in violation of said act. The complaint is in two counts, I and III. Count I (R. 2-7), in substance charges the respondents with contracting, combining and conspiring for the purpose of obtaining a monopoly of the farm paper business within the territory in which respondents' farm papers mainly circulate, in violation of section 2 of the Act (R. 6); and said first count also charges that the respondents' activities operated in restraint of trade and commerce among the several states, in violation of section 1 of the Act (R. 6). Count III (R. 7-8) charges only a violation of section 2. The issues were joined by all of the respondents filing a general denial to the complaint (R. 9-12).

All of the parties to this case are corporations and all excepting the Midwest Farm Paper Unit are publishers of state, sometimes called sectional, farm papers or magazines (R. 128). The Midwest Farm Paper Unit (hereinafter referred to as the Midwest Unit) was incorporated in 1931 (R. 20), to succeed a copartnership formed in 1928 (R. 20, 136). Its directors and officers are composed of representatives of the five respondent publishing companies (R. 136-137).

Petitioner's paper is published in Huntington,

Indiana, and its circulation, from 1928 to 1932, has been between 160,000 and 165,000. While most of its circulation has been in Indiana during this period, yet approximately 50,000 copies go into other states (R. 56). All deliveries are by United States mail. Advertising matter is of two classes: commercial, or display, and classified. The revenues received from the former far exceed those of the latter. (Classified advertising is not involved in this suit.) Subscriptions to petitioner's paper are 60 cents per year, and are obtained by the petitioner's agents, who go throughout Indiana and neighboring states to solicit them (R. 56).

About 90 per cent of the display or commercial advertising run in petitioner's magazine is obtained from points outside Indiana, and is obtained by the following methods: direct-by-mail correspondence; solicitors sent to call on the advertisers personally; and representatives located in various cities throughout the country (R. 57). Advertisers send electrotypes to the petitioner to enable it to "make up" the advertisements into pages. After using these electrotypes—which come from numerous points throughout the country—they are either shipped back to the advertiser, or are held subject to call.

The five respondent publishing companies put out seven editions, as follows:

The Prairie Farmer Publishing Company, two: "The Prairie Farmer" (Illinois Edition), and "The Prairie Farmer, Indiana Edition;" Wallace Publishing Company, one: "Wallace's Farmer and Iowa Homestead;" The Wisconsin Farmer Company, one: "The Wisconsin Agriculturist and Farmer;" The McKelvie Publishing Company, one: "The Nebraska Farmer;" Webb Publishing Company, two: "The Farmer and Farm, Stock and Home, Minnesota Edition," and "The Farmer and Farm, Stock and Home, Dakota Edition." While the circulation of the

above magazines (which, like petitioner's, are state or sectional papers) is not confined solely to the states in which they are published, yet, as their classification implies, these publications do circulate mainly in the states where they are severally published, that is, Illinios, Indiana, Iowa, Wisconsin, Nebraska, Minnesota, North Dakota and South Dakota, respectively (Exhibits 39, 40; R. 115, 117).

It was proved by the petitioner that over the period of time covered by the complaint all of the respondents had united with one another in the fixing of rates for commercial advertising to be run in respondents' publications. Petitioner's Exhibit 12 (R. 52, 53) shows, for example, the rates as quoted in 1931. A fair working illustration of how this rate schedule worked out is as follows:

An advertiser taking a full page advertisement in each edition of respondents' seven Midwest Unit publications would have to pay $4,870.00. That included as one of the seven "The Prairie Farmer, Indiana Edition." If, however, the advertiser elected to substitute petitioner's paper, "The Indiana Farmer's Guide" for "The Prairie Farmer, Indiana Edition," using only six, instead of seven of the Midwest Unit papers, the cost of those six editions would be $5,167.20. Thus the cost of the six publications would be $297.20 more than the cost of all seven of respondents' journals.

Cards showing the advertising rates of the respondent papers were widely disseminated by the respondents, including the Midwest Unit, to various advertisers who planned on using state farm papers in the Middle West; and petitioner's Exhibit 13 (R. 54, 55) is a page from a booklet distributed by The Prairie Farmer, appealing to advertisers who contemplated advertising in the Middle West to substitute "The Prairie Farmer, Indiana Edition" for petitioner's paper, "AND SAVE $.75" (for one line),

"$213.80" (for one column), "$427.60" (for two columns) and "$1,081.20" (for a full page).

Petitioner's exhibits 7-11, both inclusive (R. 26-50), are compilations of commercial advertisements of over one hundred lines carried by all of the respondent publications ***as a group*** during the years 1928-1932. The exhibits also include the lineage carried by petitioner's paper. (A line is the unit used by publishers in measuring the volume of advertising.) These exhibits show, too, the names and locations of the various advertisers who were using the farm papers involved herein.

Regarding the question of damages, petitioner's witness Frank Martin, a certified public accountant and treasurer of The Indiana Farmer's Guide (R. 75), testified that he was familiar with the data included in exhibits 7-11, just referred to, and that he had made a compilation of the total income of petitioner's journal from what is known as commercial, or display advertising, for the years 1928-1932, inclusive (R. 78). The total revenue from display advertising for the year ending March 31, 1929, being the date of petitioner's audit, was $339,597.89. In the witness' opinion, it would have been, for the same period of time, in the absence of the Midwest Unit combination rate, $357,639.14. The revenue from display advertising for the year ending March 31, 1930, was $316,919.14. It would have been, in the witness' judgment, in the absence of the combination rate, $350,832.14. The revenue from display advertising for the year ending March 31, 1931, was $223,-622.31. It would have been, in the witness' opinion, in the absence of the combination rate, $273,484.56.

The income from display advertising during the year ending March 31, 1932, was $121,843.30. The witness testified it would have been, during the same period of time, in the absence of the combination rate, $139,528.30. During the year ending March 31, 1933, petitioner's revenue from display advertising

was $61,660.45; and would have been, in the opinion of the witness, in the absence of the combination rate, $88,289.20.

The following table, based upon the foregoing figures, shows the losses in advertising revenue sustained by the petitioner during the five-year period:

1929	$18,041.25
1930	33,913.00
1931	49,862.25
1932	17,685.00
1933	26,628.75
TOTAL	$146,131.25

In explaining his computations of losses, the witness informed the Court as follows (quoting from the Record, pp. 79, 80):

> The Court: I wonder how you arrived at that amount. The business kept going down. Didn't the nature of the times have anything to do with it?
>
> The Witness: The business that we have taken into consideration was the amount of business that was placed in the Unit and was carried during that period of time.
>
> The Court: Well, that difference between what you say you did receive and what you would have if it had not been for these defendants, is that the amount of business that they took?
>
> The Witness: Yes, sir.
>
> The Court: That is the way you arrived at it?
>
> The Witness: That is the way I arrived at it.
>
> The Court: Do you have any way of

knowing whether you would have gotten it or not?

The Witness: The only way is that we have some correspondence and the rate which is in effect. We have some correspondence.

The Court: Well, did the times have anything to do with that—people taking less advertising? The fact is that they have been cutting down, haven't they?

The Witness: Yes, but this business was actually run during that period of time.

The Court: You mean—

The Witness: This lineage that we are speaking of was run and run in the competitive papers during that period of time and the effect of the rate construction made it impossible for us to secure that business. In other words—

The Court: That wasn't run in your paper?

The Witness: No, it wasn't run in our paper but the business was run.

The Court: You don't know why they changed?

The Witness: Well, they saved $1,100.00 by the way the combination rate worked out. If they buy the five (six) papers they pay $5,100.00, but, if they will take this competitive paper which is in competition with ours, they will save $300 and get the Indiana Edition of the Prairie Farmer for nothing. That is the way the thing works out and that is why we have no chance to get it.

The Court: Any other questions?

Counsel for Defendants: That is all.

The commercial advertising rate of petitioner's paper is one dollar per line (R. 75).

Respondents' Exhibits Nos. 29 and 30-31 (R. 83, 85) are from a book entitled "Standard Rate And Data Service, November, 1931," designated "The Agricultural Section," which is a standard authority. These exhibits include only papers which are members of the Audit Bureau of Circulations, which is an organization of advertisers and publishers which certifies as to the truthfulness of circulation statements (R. 121).

The upper half of Exhibit 29 (R. 83) lists the different papers dealing with agriculture, according to classification, as follows: General agricultural papers (under which classification the publications involved in this cause are there listed), Dairy, Fruit, Live Stock, Breed publications, Poultry, Pigeons & Pet Stock, Bee, Farm Newspapers, Farm Papers in Foreign Language, Specialized Farming, Farm Produce, Farm Publications Issued by Colleges, Power Farming, Cooperative, and Farmers' Associations. The lower half of this exhibit classifies these publications according to states, and, in Canada, according to provinces.

Exhibits 30-31 show the circulation of these papers, according to states. Respondents' Exhibits 32 and 33-34 (R. 93, 95); 35 and 36-37 (R. 103, 105); and 38 and 39-40 (R. 113, 115) show the same kind of data as Exhibits 29 and 30-31; but they are for different years, viz., 1929, 1930 and February, 1931, respectively, and contain approximately the same figures.

All of the foregoing Exhibits 29 to 40 were admitted in evidence over objections and exceptions of the petitioner, which objections were that the exhibits are irrelevant to the issues; that they include publications in no way involved in the case and which circulate over territory that is not embraced

within the territory in which the publications involved in this case circulate, generally; and for the further reason that said exhibits show on their face that they include a number of minor publications which do not purport to be in the general field, but some are in a field like poultry and various other small branches, that may have a bearing on the farm industry but yet not in this case would they be sufficiently pertinent to serve any question (R. 82).

On cross-examination, respondents' witness Gill testified (R. 128) that in Illinois there is published but one state or sectional paper: "The Prairie Farmer" (Illinois Edition, and Indiana Edition); in Nebraska, one: "The Nebraska Farmer;" in Iowa, one: "Wallace's Farmer and Iowa Homestead;" in Minnesota, one: "The Farmer and Farm, Stock and Home" (the Minnesota Edition and the Dakota Edition); in Wisconsin, one: "The Wisconsin Agricultrist and Farmer," and in Indiana, one: the petitioner's paper, "The Indiana Farmer's Guide." The witness was not certain as to whether the Dakota Edition of "The Farmer and Farm, Stock and Home" was published in St. Paul, where the Minnesota Edition is published.

Of the approximately three hundred farm journals published in forty-two of the forty-eight States in 1931, as shown in said Exhibit 29 (R. 83), one hundred seventy of these are technical or vocational papers. A ***technical*** paper is one that appeals to dairy farmers or any particular class of farmers (R. 127). A ***vocational*** paper is another name given for the same type of journal. The remaining magazines there listed are classified as general farm papers, which group, in turn, may include state or national farm magazines. A ***national*** farm paper is one that circulates over the Union in substantially all the states (R. 127).

The following computation, based upon Ex-

hibits 29 to 41 (R. 83-124), shows the number and type of farm papers published in the eight Midwest Unit states, in 1931:

	Total Number of Papers	General*	Vocational or Technical
Illinois	36	5	31
Indiana	10	4	6
Iowa	10	5	5
Minnesota	8	2	6
Nebraska	3	1	2
North Dakota	1	0	1
South Dakota	1	1	0
Wisconsin	8	5	3
TOTAL	77	23	54

*Includes national and state papers.

Respondents' Exhibit 41 (R. 123, 124) shows the total advertising, by lines, carried by the various national, state and sectional farm papers published throughout the country, during the years 1928-1932, inclusive. It includes both commercial and classified advertising. This exhibit was admitted over the objections and exceptions of the petitioner, which objections were that the exhibit shows on its face that it comprises total advertising in *national,* state and sectional papers, which makes it irrelevant; and that it includes many papers which are not in any essential sense competitors of the publications involved in this suit (R. 122).

In elaborating on this exhibit (No. 41) the witness Gill testified that in 1928 respondents' magazines carried 14.96 per cent of all farm journal advertising; in 1929, 15.61 per cent; in 1930, 17.79 per cent; in 1931, 18.15 per cent, and in 1932, 17.52 per cent (R. 126).

Using as a basis the same data as are given in respondents' Exhibit 41, but including only those

papers which are (or were) published in the eight states comprising the Midwest Unit—the territory covered by the complaint in this action—the following computation may be made:

	Total Lineage Carried by all Papers	Total Lineage Carried by respondents' Papers	Per Cent of Respondents' Lineage to Total
1928	7,490,806	3,323,256	44.37
1929	6,844,629	3,235,364	47.26
1930	5,172,535	2,980,963	57.63
1931	3,562,695	2,207,650	61.97
1932	2,151,376	1,439,753	66.92

(Respondents' Exhibits 29, 32, 35, 38 [R. 83, 93, 103, 113] show where the publications enumerated in Exhibit 41 are published.)

The witness Gregory testified that the respondents united and offered the combination rate to advertisers in order successfully to compete with the national farm papers. This evidence was objected to on the ground that it was too remote and not proper evidence; but it was admitted, over the objection and exception of the petitioner, on the theory that it bore upon the question of motive and whether a conspiracy had been entered into (R. 130).

Respondents showed by a computation made by their witness Gill from the statistics shown in said Exhibit 41, that from 1928 to 1932, petitioner's paper lost 71 per cent of its business; "The Nebraska Farmer" lost 70 per cent; "The Prairie Farmer" lost 66 per cent; "Wallace's Farmer and Iowa Homestead" lost 59 per cent, and "The Wisconsin Agriculturist" lost 57 per cent (R. 126). On rebuttal, the petitioner's accountant Boggs testified that petitioner's paper had lost 79 per cent of its business, over the

five-year period. But this testimony was stricken out, over the exception of the petitioner, for the reason that the data used in the computation were based upon fiscal years as of March 31, for which petitioner kept its books, instead of for calendar years, used in respondents' testimony (R. 138).

At the close of the evidence the respondents moved for an instructed verdict. The Court sustained the motion, to which ruling the petitioner asked for and was given an exception (R. 138). The Court thereupon orally instructed the jury to return a verdict for the respondents on the ground that it did not have jurisdiction to entertain the case, for the reason that there was a failure on the part of the petitioner to show the interstate character of the matters involved (R. 139).

From the judgment for the respondents upon the instructed verdict, the plaintiff appealed to the Circuit Court of Appeals, therein assigning as errors: (1) the admission in evidence of Exhibits 29, 30 and 31; (2) the admission of the testimony of the witness Gregory to the effect that the respondents found it necessary to enter into the combination rates in order to meet the competition of the national farm papers; (3) the admission in evidence of respondents' Exhibit 41; (4) the striking out of the testimony of the witness Boggs, showing loss of advertising lineage carried by petitioner's paper, as computed by him; (5) the sustaining of the respondents' motion for an instructed verdict, and (6-7) the giving of the instruction for the jury to return a verdict for the respondents (R. 141-143).

Each of these errors was duly presented on appeal, but in the opinion handed down by the Circuit Court of Appeals, the only question considered arose out of the action of the trial court in instructing the jury to return a verdict for the respondents. In disposing of this question, the Court passed over the

ground assigned by the District Court, and placed its decision upon a different ground: That under the rules laid down by this Court in the cases of ***Standard Oil Co.*** v. ***U. S.***, 283 U. S. 163,and ***Appalachian Coals, Inc.*** v. ***U. S.***, 288 U. S. 343, a proper case for the application of Sections 1, 2 and 7 of the Anti-Trust Act was not established (R. 158, 159).

IV

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In considering the statistical computations based upon respondents' Exhibits 29-40 (R. 83-117), inclusive, admitted over objections and exceptions of the petitioner, showing the circulation and place of publication of farm papers, whether state or sectional, national, or technical, and including those circulating and published in the various states scattered throughout the entire Union and in territories and localities foreign to those embraced within the issues of the complaint in this action.

3. In considering the statistical computations based upon respondents' Exhibit 41 (R. 123), admitted over the objection and exceptions of the petitioner, showing the volume of display and classified advertising lineage carried by state and sectional and national farm journals, including those published and mainly, if not exclusively, circulating in states and localities foreign to those embraced within the issues of the complaint in this action.

4. In considering the evidence of the witness Gregory, to the effect that the respondents found it necessary to unite and to offer the Midwest Unit rate in order successfully to compete with the national

farm magazines, which evidence was admitted over the objections and exception of the petitioner (R. 130).

5. In not considering the evidence of the petitioner's witness Boggs, on rebuttal, showing that petitioner's paper had lost 79 per cent of its advertising lineage during the period covered by the complaint, which evidence was stricken out, over the objection and exception of the petitioner (R. 138).

6. In deciding that it was necessary for petitioner to prove that the concerted action of respondents "effected such a restraint of interstate commerce as would materially affect the entire farm journal advertising business" (R. 158).

SUMMARY OF ARGUMENT

I

The Petitioner is Engaged in Interstate Commerce. Its Business of Disseminating Advertising to the Several States Through the Medium of its Magazine Constitutes Interstate Trade or Commerce, Within the Meaning of the Sherman Act; and the District Court Erred in Holding That It Was Without Jurisdiction Over the Subject-Matter.

Preston v. Finley, 72 Fed. 850, 857.

U. S. v. Swift & Co., 122 Fed. 529, 531-532 (modified 196 U. S. 375).

Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 17.

Furst v. Brewster, 282 U. S. 493, 497.

Station WBT v. Poulnot, 46 Fed. (2d) 671, 675.

Ramsay v. Bill Poster Assn., 260 U. S. 501, 511.

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 9.

II

The Petitioner Proved That as a Result of the

Concerted Activities of the Respondents in Combining and Offering the Midwest Unit Rate, It Lost Advertising Revenues in the Approximate Amount of $145,000.

(a) The opinion of the Court of Appeals concedes this point.

(b) The damages were properly proved.

Eastman Kodak Co v. Southern Co., 295 Fed. 98, 102.

American Can Co. v. Ladoga Canning Co., 44 Fed. (2d) 763, 768-769.

Rankin v. Bill Poster Assn., 42 Fed. (2d) 152, 155-156.

III

The Court of Appeals Erred in Holding That It Was Necessary for the Petitioner to Prove That Through Respondents' Combination "There Was Effected Such a Restraint of Interstate Commerce as Would Materially Affect the Entire Farm Journal Advertising Business."

(a) It was not necessary for petitioner to prove that the respondents' activities monopolized, or tended to monopolize, the farm paper business of the entire country, as coming within the provisions of section 2 of the Act.

U. S. v. E. C. Knight & Co., 156 U. S. 1, 17.

Thornton, "A Treatise on the Sherman Anti-Trust Act., p. 105.

Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va., 508, 525.

Eastman Kodak Co. v. Southern Co., 273 U. S. 359.

Commonwealth v. Dyer, 243 Mass. 472, 499-503.

Stewart v. Stearns, 56 Fla. 570, 588-594.

(b) It was not necessary for petitioner to prove that respondents' activities were such as restrained interstate trade or commerce in a way so as to affect the entire industry throughout the country, within the provisions of section 1 of the Act.

U. S. v. Keystone Watch Case Co., 218 Fed. 502, 518.

Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30, 42-43.

(c) A directed verdict was improper; neither of the Courts below was entitled to weigh the evidence as to whether the facts proved at the trial showed such a restraint of trade or commerce as violated the provisions of the Act.

Gasco v. Tracas, 85 Ind. App. 591, 594.

Conformity Act, 28 U. S. C. A. 724; R. S. Sec. 914.

Shadoan v. Cincinnati Ry. Co., 220 Fed. 68, 73.

(d) The opinion of the Court of Appeals was based upon a misconception of the two cases of this Court therein referred to, namely, Appalachian Coals, Inc. v. U. S., 288 U. S. 343, and Standard Oil Co. v. U. S., 283 U. S. 163.

IV

It Was Error for the Court of Appeals to Consider Respondents' Computations and Statistics Based Upon Exhibits 29-40.

(a) Said exhibits were not proper evidence for the reason that the greater majority of the journals there listed is shown on the face of said exhibits to be papers which are published and circulated in parts of the Union entirely foreign to the territory involved in the complaint.

(b) Said exhibits include technical or vocational, as well as national farm papers, which are not in any essential sense competitors of the type of papers involved in this suit, namely, state farm papers.

(c) Said exhibits were admitted over objections and exceptions of the petitioner.

V

It Was Error for the Court of Appeals to Consider Respondents' Computations and Statistics Based Upon Exhibit No. 41.

(a) Said exhibit was not proper evidence for the reason that the publications there listed include journals published and circulating in states and sections of the country entirely foreign to the territory involved under the issues in the case.

(b) Said exhibit includes journals that are not and could not be in any essential sense competitors of the papers involved in this suit.

(c) Said exhibit was admitted over the objection and exception of the petitioner.

VI

The Court of Appeals Erred in Considering the Evidence of the Witness Gregory, to the Effect That the Respondents Found it Necessary to Combine and to offer the Midwest Unit Rate, in Order to Meet the Competition of the So-Called National Farm Papers.

(a) The prohibitions of the Sherman Anti-Trust Act cannot be evaded by good motives.

Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30, 44.
Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 234.

(b) The evidence was admitted over the objection and exception of the petitioner.

VII

The Court of Appeals Erred in Not Considering the Rebuttal Evidence of Petitioner's Witness Boggs, Showing That Petitioner's Paper Lost 79 Per Cent of its Advertising Lineage Over the Period of Time Between March 31, 1928, and March 31, 1932.

(a) The mere difference of three months, representing the difference in fiscal years, for which petitioner kept its books, and calendar years, upon which respondents' computation was based, afforded no justifiable reason for striking out this evidence.

V

Argument

I

District Court Erred in Declining Jurisdiction: Interstate Commerce Involved

In directing the jury to return a verdict for the respondents on the ground that petitioner had failed to prove that its activities constituted interstate commerce and that therefore that Court was without jurisdiction, it seems clear that the District Court inadvertantly erred. The evidence showed that the petitioner's magazine circulated throughout several states and that about 90 per cent of its commercial advertising was received from advertisers outside of Indiana. These advertisements were solicited in several ways: By direct-by-mail correspondence; by agents sent to call upon interested persons, and through advertising agencies located and maintained by the petitioner in various cities. Advertisers send cuts or electrotypes to be used in setting up advertisements; these cuts afterward are sent back to the advertiser (R. 57).

A paper or magazine circulating throughout the states is engaged in interstate commerce. ***Preston*** v. ***Finley,*** 72 Fed. 850, 857. The various activities of the petitioner's agents in soliciting advertising are interstate commerce. ***United States*** v. ***Swift & Co.,*** 122 Fed. 529, 531-532 (modified 196 U. S. 375); ***Butler Bros. Shoe Co.*** v. ***United States Rubber Co.,*** 156 Fed. 1, 17; ***Furst*** v. ***Brewster,*** 282 U. S. 493, 497. It was held in the case of ***Station WBT*** v. ***Poulnot,*** 46 Fed. (2d) 671, 675, that distributing advertisements to other states over the radio constitutes interstate commerce. It would seem clear, therefore, that the

act of distributing advertisements to other states through such a tangible medium as a magazine would constitute interstate commerce. See also: ***Ramsay*** v. ***Bill Posters Assn.,*** 260 U. S. 501, 511, and ***Pensacola Telegraph Co.*** v. ***Western Union Telegraph Co.,*** 96 U. S. 1, 9.

The opinion of the Court of Appeals proceeds upon the assumption that the petitioner was engaged in interstate commerce and that, in fact, the District Court did have jurisdiction over the subject-matter.

The respondents contended below that under the decision in the case of ***Blumenstock Bros.*** v. ***Curtis Publishing Co.,*** 252 U. S. 436, the District Court did not err in refusing jurisdiction. That was a case wherein the plaintiff charged the Curtis Publishing Company with violating provisions of the Sherman Act for refusing to accept certain contracts for advertising which plaintiff desired the defendant to carry in its magazines. The defendant refused to accept these advertisements except upon certain conditions. The decision did not and could not turn upon the character of the reasons which were assigned by the defendant for refusing to accept the advertisements offered by the plaintiff; but the court rightfully held—as in the case of ***Whitwell*** v. ***Continental Tobacco Co.,*** 125 Fed. 454, 456—that the defendant had the right arbitrarily to decide upon what terms it would deal with its customers.

The language of this Court in ***Stafford*** v. ***Wallace,*** 258 U. S. 495, 527, supports this construction:

> "The case of Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, is easily distinguishable from the one at bar. There it was merely held that an attempt of a publisher to monopolize the business of publish-

ing advertising matter in magazines resulting in refusal of such publisher to accept advertising in its magazines was too remote in its relation to the interstate commerce of circulating magazines."

II

Substantial Damages Were Proved

In offering rates to advertisers wherein the cost of a full page advertisement in ***six*** of the respondent publications (there being a total of seven) would be $297.20 more than the cost of ***all seven*** editions (Exhibit 12, R. 52), the respondents have conceived a scheme which has sapped the life blood of the petitioner's paper. Advertisers who have a product which, for example, is particularly adapted to the corn belt states, usually advertise through the state farm papers, such as are those of the parties to this litigation, in the territory covered by the eight states involved in the complaint. If advertisers desired to use petitioner's paper, in order to cover Indiana, and to exclude the respondent paper, "The Prairie Farmer, Indiana Edition," for Indiana coverage, they could not get the so-called Midwest Unit rate.

The result was, as shown by the evidence, that because of respondents' rate schedule the petitioner, during the period of time covered by the complaint, lost $146,000 in advertising revenues (R. 78-79-80.)

The method of proving such loss is shown herein under the "Statement of the Matters Involved." (See ante, pages 5-7.)

The method of proving the damages was proper.

Eastman Kodak Co. v. Southern Co., 295 Fed. 98, 102.

American Can Co. v. Ladoga Canning Co., 44 Fed. (2d) 763, 768-769.

Rankin v. Billposters Ass'n., 42 Fed. (2d) 152, 155-156.

As to the point of damages, the Circuit Court of Appeals said (R. 157):

> "Appellant also showed that because of such competition it lost some of its advertisers, and, upon a theory explained by its accountant (not material here), it was damaged to the amount of $145,000."

III

Opinion of Court of Appeals: Monopoly Incomplete: Restraint of Trade

Going now to the crux of the opinion of the Circuit Court of Appeals, it held (R. 158) as follows:

> "In disposing of the appeal we have accepted appellant's assertion that it lost some commercial advertisers due to the combination rate of appellees. We are, however, not satisfied that appellant has established a fact which rested upon it to prove; viz., that through this combination there was effected such a restraint of interstate commerce as would materially affect the entire farm journal advertising business."

As pertaining to the question of monopoly, we further quote from the opinion (R. 158):

> "* * * But we cannot escape the force of appellees' statement—'* * If, as held in ***Standard Oil*** v. ***United States,*** 283 U. S. 163, the owners of 55 per cent of the gasoline in the United States could not by combination obtain a monopoly in violation of the Sherman Act, and if, as held in

Appalachian Coals v. ***United States,*** 288 U. S. 343, the owners of 74 per cent of the coal mined in a certain territory could not obtain a monopoly in violation of the Sherman Act, then how can it be held that 5 out of approximately 300 newspapers can obtain a monopoly of advertising, and how can it be held that newspapers which do only approximately 15 per cent of the advertising in the farm journal field can obtain a monopoly?' "

Without now considering the application of the two cases just referred to, or the character of the 300 papers mentioned, but leaving those questions for a later discussion, is it necessary in order to constitute a monopoly or an attempt to monopolize trade or commerce, within the meaning of Section 2 of the Sherman Act, that the combination complained of be a complete monopoly?

"Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

United States v. E. C. Knight & Co., 156 U. S. 1, 17.

"Any agreement, understanding or combination that tends to create a monopoly is void. Such an agreement, of course, need not create a complete monopoly."

Thornton, "A Treatise on the Sherman Anti-Trust Act," p. 105.

"* * If a contract or combination in unreasonable restraint of trade could not be attacked until a complete monopoly had been formed, then the law against monopolies would be unavailing. In this country it would be almost impossible to combine all the interests in any line of industry into a single and complete monopoly. If only complete monopolies could be reached under the law, a combination could then be formed tending to monopoly and embracing substantially all the evil results of a complete monopoly, intentionally leaving out of the combination some one or more of those engaged in the industry for the very purpose of rendering the combination legal. A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; nor by its performance, but by its powers of performance when fully exercised."

Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. V. 508, 525.

In ***Eastman Kodak Co.*** v. ***Southern Co.,*** 273 U. S. 359, there was held to be a purpose to monopolize the business of photo supplies in the city of Atlanta, Georgia. Likewise, in ***Commonwealth*** v. ***Dyer,*** 243 Mass. 472, 499-503, there was held to be a monopoly of the fish business in the city of Boston. There even may be a monopoly in a village. ***Stewart*** v. ***Stearns,*** 56 Fla. 570, 588-594.

While it is true that respondents' journals carry a comparatively small percentage of the total advertising carried by all general farm papers throughout the country, yet the following computation, based upon those papers published in the eight states comprising the Midwest Unit, that is, the territory

covered under the issues in this cause, not only shows a much higher percentage, but at the same time it reveals the success of respondents' activities in obtaining a monopoly in this territory: In 1928 respondents' journals carried 44.3 per cent; in 1929, 47.2 per cent; in 1930, 57.6 per cent; in 1931, 61.9 per cent, and in 1932, 66.9 per cent of the total advertising run by the general farm papers in these eight states. (See ante, page 11.)

Going now to Section 1 of the Sherman Act, we find no precedent for the holding of the Court of Appeals that, to constitute a violation of this section, respondents' activities would have to restrain trade or commerce in a way so as to affect the entire farm paper industry throughout the country. It would be difficult to conceive a state of facts under which recovery could ever be had, were this the law.

> "And this brings us to the next question, no matter at what point of time the inquiry may be undertaken, namely: What are the ordinary marks of such a course of conduct as may properly be condemned as a restraint of trade? . . . . Trade is restrained by putting hindrances in the way of the persons that conduct it. Whatever makes it more difficult for such persons to carry on their business restrains them, and restrains their trade. . . . Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. . ."
>
> United States v. Keystone Watch Case Co., 218 Fed. 502, 518.

Indeed, whether speaking of restraint of trade or commerce within the provisions of either Section 1 or 2, we have found no authorities which lay down as tests to be considered in applying the Act, the

facts of dominance or coercion as relating in scope to the entire industry, though it be nation wide. Rather, the tests are those laid down in ***Paramount Famous Lasky Corporation*** v. ***United States,*** 282 U. S. 30, 42-43:

> " 'The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word, to preserve the right of freedom to trade.' U. S. v. Colgate & Co., 250 U. S. 300, 307. 'The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.' Ramsay Co. v. Associated Bill Posters of United States and Canada, 260 U. S. 501, 512. 'The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict and advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.' U. S. v. American Oil Co., 262 U. S. 371, 388."

There can be no escape from the fact that petitioner's business has been directly restrained. No refinement of reasoning can show that respondents' activities constitute the healthy, normal, fair or honest type of competition spoken of in the cases deciding that there had been no infringement of the provisions of the Act.

Neither the District Court nor the Court

of Appeals had the right to weigh the evidence as to whether the facts proven showed such a restraint of trade or commerce as violated the provisions of the Act. Of course, as heretofore has been shown, the District Court directed a verdict on the ground of not having jurisdiction over the subject-matter. But certainly the Circuit Court of Appeals was in no better position than the trial Court to weigh the facts as to whether there had been a restraint of trade, or whether the various farm papers scattered throughout the country were in competition with the journals involved in this proceeding.

> "It is a well-established rule of law that it is only when the evidence upon any question is undisputed, and only one legitimate inference can be drawn therefrom, that the court has a right to direct the verdict. If there be any evidence whatever having legal weight, or any legitimate inference from the evidence tending to support appellant's right to recover, the question should have been left to the jury."
>
> Gasco v. Tracas, 85 Ind. App. 591, 594.

Under the conformity statute, 28 U. S. C. A. 724; R. S. Sec. 914, the Federal courts below were bound by the Indiana law, in respect to weighing the evidence as expressed in the above opinion.

> Shadoan v. Cincinnati Railway Co., 220 Fed. 68, 73.

The opinion of the Circuit Court of Appeals is based upon the two recent cases of this Court, viz., ***Appalachian Coals, Inc.*** v. ***United States,*** 288 U. S. 343, and ***Standard Oil Co.*** v. ***United States,*** 283 U. S.

163. We feel, and earnestly urge, that the Court of Appeals inadvertantly misconceived the holdings and principles laid down in those two cases.

At the outset it will, of course, be noted that in each of those cases the action was brought by the Government for injunctive relief, with the right of the District Courts to pass upon questions of fact with reference to which there might be conflicting evidence; and in each case, the facts as found failed to disclose any restraint or monopoly of interstate commerce. In the case at bar it was the province of the jury to pass upon these facts.

Going now to the Appalachian case: We find nothing in the opinion which conflicts with the cases and principles upon which the petitioner herein relies. The distinctions between the facts in that case and the one at bar are apparent on the fact of the opinion. Quoting from the opinion, pages 359-360:

> "There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public service, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its funda-

mental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The decisions establish, said this court in Nash v. United States, 229 U. S. 373, 376, 'that only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' * * *

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case.* * *"

We quote this passage, as found at page 371 of the opinion:

"* * * Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not restrict their business.* * *"

At page 372 the Court points out the deplorable condition of the industry, going on to say:

"* * * The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fair, and thus to promote the essential interests of commerce.* * *"

The following language found at pages 374-375 aids us in pointing out the distinctions:

"Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. American Column & Lumber Co. v. U. S. 257 U. S. 377; U. S. v. American Linseed Oil Co., 262 U. S. 371."

And at page 377:

"* * * As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint.* * *"

And then the opinion states the point for decision (pages 377-378):

"* * * We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the ***impairment of fair competitive opportunities,*** the decision on the present record should not preclude the Government from seeking the remedy suited to such a state of facts." (Our italics.)

We reiterate that respondents' scheme has already been tried out and the results are only too patent, namely, that the petitioner has suffered a substantial loss; that the Midwest Unit rate has enabled respondents' journals to increase their percentage of advertising carried by the publications in the

territory involved under the issues, from 44 per cent, in 1928, to 67 per cent, in 1932.

The Standard Oil case: The facts in the Standard Oil Company case are so inherently different from those in the case at bar as to make comparisons between the two cases of little value. It is to be pointed out, however, that the opinion did not turn upon the mere fact that the owners of 55 per cent of the gasoline in the United States could not by combination obtain a monopoly in violation of the Sherman Act. Rather, it was held that the provisions in the contracts for the division of royalties are not in themselves conclusive evidence of illegality; and that where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than by litigation, is not precluded by the Sherman Act. We quote a few excerpts from the opinion as showing some of the points of distinction.

At page 172 the Court said:

> "The Government next contends that the agreements to maintain royalties violate the Sherman Law because the fees charged are onerous. The argument is that the competitive advantage which the three primary defendants enjoy of manufacturing cracked gasoline free of royalty, while licensees must pay to them a heavy tribute in fees, enables these primary defendants to exclude from interstate commerce cracked gasoline which would, under lower competitive royalty rates, be produced by possible rivals. This argument ignores the privileges incident to ownership of patents. Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does

not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce.* * *"

And again, at page 179:

"Thus it appears that no monopoly of any kind, or restraint of interstate commerce, has been effected either by means of the contracts or in some other way.* * *"

The Court went on to say, at pages 180-181:

"* * * The master found, after an elaborate review of the entire art, that the presumption of validity attaching to the patents had not been negatived in any way; that they merited a broad interpretation; that they had been acquired in good faith; and that the scope of the several groups of patents overlapped sufficiently to justify the threats and fear of litigation.* * *"

We are unable to find any implications from the face of the opinion which would have the slightest tendency to condone or to uphold the activities of the respondents, in the case at bar.

IV

Respondents' Exhibits 29-40: Classification of Farm Papers: Irrelevancy

The Court of Appeals adopted the statistics proven by respondents, to the effect that from 1928 to 1932 there were approximately 300 different farm magazines published in the United States. This, of course, the petitioner does not dispute. These figures were taken from the data supplied in respondents' Exhibits 29-40, inclusive (R. 83-115), which exhibits were admitted over the exceptions of petitioner. We believe that the Court of Appeals arrived at a misunderstanding as to the

nature of farm magazines. In its opinion (R. 157) it says, "Farm magazines are divided into two classes: national and state." Of the approximately 300 farm journals published in 42 of the 48 states, in 1931, as shown in Exhibit 29 (R. 83), about 170 of these are technical or vocational papers, a distinct type of paper which appeals to some particular phase of agriculture such as poultry, bee, pigeons and pet stock, etc., (R. 127). In fact, the upper half of Exhibit 29 (R. 83) shows 16 different kinds of technical or vocational papers. Respondents made no claim that the technical or vocational journals were competitors, other than in a general way, of the state farm papers involved in this action. And, of course, because of their peculiar nature, they are not.

A national farm paper is one which circulates over the Union in substantially all the states (R. 127). While the respondents gave as their motive for putting into effect the Midwest Unit rate, that the national papers afforded such strong competition as to make that necessary, yet as a matter of fact, this argument (even though it would not constitute a defense) is fallacious for at least two reasons: (1) Advertisers who wanted to promote the sale of goods peculiarly adapted to the Middle Western states would not advertise in a magazine of national circulation, whose advertising rates would be greater on account of its vast circulation, because they would be paying for advertisements placed in a territory in which there would be no hope nor desire for sales. (2) The real competitors of state farm papers are—state farm papers. Throughout the eight Midwest Unit states there are published but eight state farm papers, including the two editions of each "The Prairie Farmer" and "The Farmer and Farm, Stock and Home," and also including petitioner's paper. Indiana is the only one of the eight states,

excepting the Dakotas, in which there are two competing state farm papers (R. 128).

Petitioner's Exhibit 13 (R. 54) is a page from a booklet distributed by the respondent, The Prairie Farmer Publishing Company, appealing to advertisers who contemplated advertising in the Middle West to substitute "The Prairie Farmer, Indiana Edition," for petitioner's paper, in order to make certain saving therein computed. That it was the purpose of respondents to deprive the petitioner of its advertising accounts, is revealed by this exhibit showing the unfair rate set-up.

Included among the said 300 farm paper publications referred to in the opinion of the Court of Appeals, are state farm papers published in nearly every state in the Union. How could it be said, for example, that a state farm paper published in Oregon, and therefore circulating mainly in Oregon, could be in competition with the state farm papers published in the Middle West? Under the "Statement of the Matters Involved" (See ante, p. 10) is a computation showing the number and type of farm journals published in the eight Midwest Unit states in 1931. There was a total of 77 papers, 54 of which were vocational or technical papers; and the balance, 23, were general farm papers. The latter classification includes both state and national papers. From what has been said, none of these Exhibits 29-40, inclusive, should have been admitted in evidence over petitioner's objections. The Court of Appeals therefore erred in accepting (and in fact basing its opinion upon) the computations made up from these exhibits.

V

Respondents' Exhibit 41: Lineage, Statistics of Papers on Nation-Wide Basis

Respondents' Exhibit 41, which was admitted

over petitioner's exceptions, shows the total lineage of the various state and national farm papers published throughout the Union. We have just shown why such publications as state farm papers published in Oregon, California, Pennsylvania, etc., are not competitors of the journals involved in this proceeding. Likewise, we have shown that the national farm papers are not in any essential sense competitors of the journals involved in this litigation. Under the issues of this case, any computation that would compare the advertising lineage carried by respondents' papers to the total advertising lineage carried by the papers of the entire country, would be irrelevant.

Respondents proved that using as a basis the figures contained in said Exhibit 41, the respondents carried 14.96 per cent, 15.61 per cent, 17.79 per cent, 18.15 per cent and 17.52 per cent of the total advertising lineage of all of the state or national farm papers in the country, for the years 1929-1932, respectively. Using the same exhibit, No. 41, but confining the computation to only those papers published within the eight states covered under the issues—and indeed the only states that should ever have been considered by the Court of Appeals—an entirely different picture is presented. In 1928 respondents' papers carried 44.37 per cent; in 1929, 47.26 per cent; in 1930, 57.63 per cent; in 1931, 61.97 per cent, and in 1932, 66.92 per cent. In comparing these two sets of computations, we particularly point out to the Court that in the first computation, involving the nation-wide comparison, in 1932 respondents' percentage dropped under that of 1931; whereas in the computation based upon the advertising carried in the eight states covered by the Midwest Unit, respondents' percentage increased from 61.97 per cent in 1931, to 66.92 per cent in 1932. This graphically shows the success of respondents' rate

schedule in suppressing trade and commerce within this territory, during the period of time covered by the complaint.

VI

Good Motives no Excuse if Provisions of Act Have Been Violated

The Court of Appeals seemingly accepted respondents' position as given by the witness Gregory, to the effect that respondents found it necessary to combine and to offer the Midwest Unit rate in order to meet the competition of the so-called national papers. The evidence was admitted over the exceptions of the petitioner. Assuming, for the sake of argument only, that the national papers did afford substantial competition, nevertheless it is our understanding that while the courts may allow evidence tending to show the conditions of an industry, etc., yet the prohibitions of the Sherman Anti-Trust Act cannot be evaded by good motives.

> "The prohibitions of the statute" (referring to the Sherman Act) "cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the court cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results.' Standard Sanitary Mfg. Co. v. U. S., 229 U. S. 20, 49."
>
> Paramount Famous Lasky Corp. v. United States, 282 U. S. 30, 44.

See also: Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234.

VII

Petitioner's Rebuttal Evidence Showing Loss of 79 Per Cent

While of course the following point is not of any controlling importance in the case, yet nevertheless we believe the Court of Appeals erred in not considering the rebuttal evidence of petitioner's witness Boggs, showing that petitioner's paper lost 79 per cent (instead of 71 per cent, according to respondents' evidence) of its advertising lineage over the period of time between March 31, 1928, and March 31, 1932. The mere difference of three months, representing the difference in fiscal years, for which petitioner kept its books, and calendar years, upon which respondents' computation was based, hardly afforded a justifiable reason for the District Court's striking out this evidence, over the objection and exception of the petitioner.

CONCLUSION

We believe the following conclusions may fairly be drawn from the record and the authorities:

(1) The procuring of advertisements from various states and the publishing of such advertisements in farm magazines which circulate in various states, as charged and proven in this case, is interstate commerce; and, therefore, the District Court erred in holding that it was without jurisdiction over the subject-matter.

(2) To effect an unlawful restraint or monopoly of interstate commerce, it is not necessary to aver and prove that the combination activities in question constitute a substantial monopoly of the entire in-

dustry throughout the nation; and, therefore, the Court of Appeals erred in applying the comparative national business percentage as the test of unlawfulness.

(3) In making a comparative business percentage computation, the statistical data used should be restricted to the territory covered by the charge and to publications in normal competition with each other within such territory; and, therefore, the Court of Appeals should have confined the comparative computation to the several states covered by the publications of the petitioner and respondents, and to papers of like character.

(4) When fairly understood from the pertinent computations based upon the record data, it becomes apparent that the respondents have acquired a substantial monopoly of the advertising business in farm papers within the eight states in question; and, therefore, these concerted activities are in violation of Sections 1 and 2 of the Sherman Act.

(5) There was such substantial evidence tending to show a violation of the Act as to make it a question of fact for the jury, and therefore it was error to instruct a verdict for the respondents.

(6) The combining of the respondents through the Midwest Unit, for the purpose of obtaining the life blood of competitive publications through the unfair advertising rate set-up, tends to and does destroy normal competition; and, therefore, it is not only a question of loss of advertising revenues, but, moreover, the very power of the Midwest Unit com-

petitors—more particularly the petitioner—to continue in the publishing business is seriously threatened.

Respectfully submitted,

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APPENDIX

Sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209, 210; U. S. C. A. Title 15, are as follow:

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.* * *"

Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor,* * *"

The Conformity Statute, 28 U. S. C. A. 724, R. S. Sec. 914, reads:

"The practice, pleadings, and forms and modes of proceeding in civil causes..... in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary nothwithstanding."